

ESTATE OF JOSEPH SIMMONS, SR.

IBIA 77-46

Decided March 31, 1978

Appeal from a Decision Determining Fair Market Value and Determining Parties Eligible to Share Therein.

Affirmed in Part; Reversed in Part and Remanded.

1. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Yakima Tribes: Generally

The fair market value date is considered to be the date of hearing to determine value.

2. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Yakima Tribes: Generally

Interest is due and payable only on the unpaid balance of the fair market value as determined from the date of filing the election to take by the Tribe.

3. Indian Lands: Tribal Rights in Allotted Lands--Indian Probate:
Yakima Tribes: Generally

A statutory option held by the Tribe to take interest in land under the Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607 (1970)), does not vest any right in such interests until payment by the Tribe of the fair market value as determined by the Administrative Law Judge after hearing if demanded, plus interest.

APPEARANCES: Tim Weaver, Esq., Hovis, Cockrill and Roy, for appellant, the Yakima Indian Nation, and Gene Godderis, Esq., and William L. Wade Cole, Esq., for appellees, Viola M. Mataruso, Katherine H. Paul, Mary A. Hohn, Agnes M. Hohn, Clarence P. Tougaw, Edmond C. Tougaw, and Louis R. Tougaw.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

This is an appeal by the Yakima Indian Nation, hereinafter referred to as either appellant or Tribe, by and through its attorneys, Hovis, Cockrill and Roy, from Administrative Law Judge Robert C. Snashall's final order of April 8, 1977, determining the fair market value of Yakima allotments Nos. 124-M394 (Martha Riddle); 124-3830 (Annie Simmons); 124-3839 (Lucy Simmons) and determining the heirs eligible to share therein.

Joseph Simmons, Sr., Yakima No. 124-2121, died intestate on March 29, 1960. On April 11, 1961, a hearing was duly held and concluded by the late Administrative Law Judge R. J. Montgomery. Thereafter, on September 25, 1974, an Order Determining Heirs was issued by Judge Montgomery wherein the decedent's children and grandchildren, totaling 12, were found to be his heirs. Judge Montgomery in the same Order found that the estate was subject to the option of the Yakima Indian Tribe to purchase the shares of the heirs pursuant to the Act of December 31, 1970, 84 Stat. 1874; 25 U.S.C. § 607. Based on Bureau of Indian Affairs' appraisals of August 18, 1971, and April 3, 1972, the value of the property subject to the Tribe's option was estimated at \$23,407.

On November 13, 1974, the Yakima Tribal Land Committee exercised its option to purchase the trust interests of the heirs for the estimated sum of \$23,407. This amount was deposited by the Yakima Tribe to the decedent's trust account No. S-475 on December 3, 1974. Thereafter, on December 11, 1974, Judge Montgomery by supplemental Order of Distribution transferred all right, title, and interest in the property in question to the Tribe and ordered the Superintendent of the Yakima Agency to make distribution of the \$23,407 to the decedent's heirs as set forth in the Order of September 25, 1974, supra.

A Petition for Rehearing was timely filed on January 22, 1975, by Viola M. Mataruso and Mary A. Hohn through their attorneys, Healy and Godderis. Petitioners, among other things, primarily questioned the value placed on the property purportedly purchased and as set forth in the Supplemental Order of Distribution dated December 11, 1974.

Administrative Law Judge Robert C. Snashall, Judge Montgomery's successor, on May 9, 1975, issued an order wherein he vacated Judge Montgomery's Supplemental Order of Distribution of December 11, 1974, and ordered a valuation rehearing. The Judge furthermore ordered the Superintendent of the Yakima Agency to cause an appraisal of the property in question to be made as of the date of the original inspection and for updating the appraisal as of the date of his order, May 9, 1975.

Thereafter, after notice to all parties, valuation hearings were held at Tacoma, Washington, on December 9, 1975, and May 4, 1976, by Judge Snashall.

From the evidence adduced at the valuation hearings, Judge Snashall on April 8, 1977, issued a final valuation order wherein he determined the fair market value of the purchased interests to be \$54,310 together with interest at 8 percent per annum on the total of said amount in excess of \$23,407 from December 3, 1974, until the deficiency was deposited. The fair market value was based on the appraisal of May 9, 1975. Moreover, the Judge found that all 12 heirs as determined in the order of September 25, 1974, were entitled to share in the increased value.

It is from the foregoing order that this appeal has been taken by the Yakima Indian Nation.

As bases for its appeal the appellant, the Yakima Indian Nation, alleges the following errors:

(1) The determination of the Administrative Law Judge that the valuation date appropriate for determining fair market value under the provisions of the Yakima Act of December 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607) (hereinafter "the Act") was December 3, 1974.

(2) The determination by the Administrative Law Judge that the Yakima Nation must pay interest on the increased award from December 3, 1974, rather than from the date of the opinion, April 8, 1977, has no basis in the law or the regulations.

(3) The Administrative Law Judge erred in determining that heirs other than Viola Mataruso and Mary A. Hohn are eligible to share in the increased award.

Preliminary to considering appellant's contentions, in reviewing the factual background resulting in the appeal herein, we find existing regulations, 43 CFR 4.300-4.317, as published on August 30, 1974 (39 FR 31635), effective as of September 30, 1974, to be controlling in this case notwithstanding any language appearing to the contrary in the final order (valuation) of April 8, 1977. We further find the regulations to be sufficiently clear and unambiguous.

With regard to the above alleged error (1), the appellant contends that the only rational, logical, and universally consistent date for probate purposes (valuation) must be the date of death of the decedent, Joseph Simmons, Sr., March 29, 1960. We disagree with such contention. The same argument was before the Board in the Estates of Cecelia Smith Vergote (Borger); Morris A. (K.) Charles and Caroline J. Charles (Brendale), 5 IBIA 96 (1976).

In rejecting the date-of-death argument, the Board in the foregoing cases stated at page 105:

Absent controlling guidelines in either the statutes or regulations concerning the selection of a valuation date, the Board concluded in its remand that it would be most equitable in this case to charge the Yakima Tribe for the value of the property as of the time of the Tribe's election to purchase. [Footnote omitted.]

In Smith, Charles and Brendale, *supra*, the Tribe had elected to purchase prior to September 30, 1974, the date the present regulations went into effect. Accordingly, the regulations, 43 CFR 4.300-4.317, were not found to be applicable or controlling. See also Estate of Temens (Timens) Vivian Gardafee, 5 IBIA 113 (1976).

In the instant appeal the regulations were in effect on November 13, 1974, the date the Tribe elected to purchase the property. Consequently the valuation date would be determined in accordance with existing regulations, 43 CFR 4.306, which in relevant part provides: "Upon conclusion of the hearing, the Judge shall * * * include findings of fact and conclusions in each case with a judgment establishing the fair market value of those interests to be taken by the Tribe * * *."

[1] The Board, in addressing the valuation date question under the regulations in the Estate of Edward Lewis Pitt, 6 IBIA 156, found it to be the date of the hearing to determine value.

It is noted that the appellees or respondents herein were agreeable to the use of the appraisal of May 9, 1975, as updated on December 7, 1976, for determining the fair market value for the interest taken in the valuation hearings of December 9, 1975 (Tr. 2, 3, 4), and May 4, 1976 (Tr. 3, 4). The Tribe or the appellant on the other hand took the position that value should be determined as of the date of death and chose not to submit any evidence for or against the May 9, 1975, appraisal or its use in determining fair market value for the optioned interests. Accordingly, we affirm the fair market value for the optioned interests to be \$54,310 as determined by Judge Snashall based on the appraisal of May 9, 1975, as updated by supplemental appraisal reports or statements on December 7, 1976. We, however, disagree with the Judge's statement "that the fair market value to be as appraised and reported in the appraisal report as of December 3, 1974," since we have determined the valuation date to be the date of hearing to determine value.

On March 6, 1978, a stipulation between the Tribe and the appellees representing a one-sixth share in the optioned interests only was filed with the Board whereby the parties agreed to a settlement based

on the fair market value of \$54,310 as determined by Judge Snashall. The stipulation has been duly noted. However, it is considered of little consequence since the fair market value of the optioned property has been found by the Board to be in the same amount. Accordingly, approval of the stipulation requesting immediate disbursement of the one-sixth share of the stipulated amount is denied. To approve the stipulation and to order immediate disbursement would only result in unnecessary and additional administrative time and expense in processing same, thus, delaying further the ultimate resolution of this case. Moreover, the interests of the beneficiaries under the stipulation will in no manner be diminished or jeopardized by the denial nor will it unduly inconvenience them to await the orderly resolution of this case before receiving their share of the fair market value of the property as determined herein.

We are in agreement with appellant's second contention regarding interest being charged at the rate of 8 percent per annum on the increased award (\$30,903) from December 3, 1974, until the deficiency has been deposited into the estate account. In view of our ruling that the regulations are applicable and controlling regarding the determination of the fair market value, it only follows that the regulations would likewise be applicable and controlling regarding the interest to be paid by the Tribe.

[2] The Tribe in this appeal would only be obligated under 43 CFR 4.311 to pay interest at the rate of 8 percent per annum on any unpaid balance of the fair market value from the date of the filing of the election to take. 43 CFR 4.310. Estate of Edward Lewis Pitt, *supra*. Accordingly, we find that liability for the payment of any interest will accrue only if the Tribe fails to make full payment of the unpaid balance of the fair market value as determined herein once it has filed with the Superintendent a specific list of the interests it elects to take within the 20-day period provided in 43 CFR 4.310(a). We therefore reverse Judge Snashall's ruling to the contrary.

We disagree with the appellant's third and final contention that heirs other than the appellees, Viola Mataruso and Mary A. Hohn, are not eligible to share in the increased award. The transcript of the valuation hearing held on May 4, 1976, appears to indicate that attorney Gene Goddard was representing all of the heirs named in the original Order Determining Heirs, dated September 25, 1974.

Whether or not all heirs were actually intended to be represented is of no consequence. The Act of 1970, *supra*, requires that the Secretary of the Interior determine the fair market value for property taken under the Act after appraisal. Regulations implementing the Act provide for the fair market value to be determined as of the date of the hearing to determine value. In this case the fair market value for the property taken was determined for the first and only time by the Judge in his order of April 8, 1977. In view thereof, we find

that all heirs whose names appear in the Order of September 25, 1974, are as a matter of law entitled to their respective shares in the fair market value of the optioned property as determined by Judge Snashall and as affirmed herein. To rule otherwise would be violative of the intent of the Act, supra, existing regulations and the Department's trust responsibility to all heirs involved.

[3] We further find that a statutory option held by the Tribe to take interest in land, such as in this case, under the Act of December 31, 1970, supra, does not vest any right in such interest until payment by the Tribe of the full fair market value as determined by the Administrative Law Judge after hearing if demanded, plus any unpaid interest. Accordingly, in this case title to the property involved did not vest in the United States in trust for the Tribe on December 11, 1974, the date of the supplemental order of distribution. It would therefore follow that the \$23,407 deposited by the Tribe on December 3, 1974, remains the property of the Tribe together with any interest accruing thereon up until the time the Tribe elects to take the interests in question under 43 CFR 4.310. Moreover, title will not vest until election is made by the Tribe at the proper time in keeping with the regulations, 43 CFR 4.310(a) and the full fair market value of said optioned property as determined by Judge Snashall and affirmed herein by the Board is paid into the estate account. In order to accomplish the foregoing, the appeal should be remanded to Judge Snashall for the purpose of enabling the Tribe or appellant to comply with the provisions of 43 CFR 4.310(a) and (b) and 4.311 upon this decision becoming final.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the final order (valuation), entered by Administrative Law Judge Snashall on April 8, 1977, is (1) AFFIRMED as to the fair market value for the optioned property and the right of all heirs determined under the order of September 25, 1974, to share therein in their respective shares; (2) REVERSED as to the assessment of interest at the rate of 8 percent per annum on the total amount of excess of \$23,407 from December 3, 1974; and, (3) the matter is REMANDED to Judge Snashall for the purpose of having the appellant comply with the provisions of 43 CFR 4.310 and 4.311 and for the further purpose of implementing the provisions of 43 CFR 4.313.

This decision is final for the Department.

Done at Arlington, Virginia.

Alexander H. Wilson
Chief Administrative Judge

I concur:

Mitchell J. Sabagh
Administrative Judge